

BRB Nos. 13-0537 BLA  
and 13-0546 BLA

JANICE FAYE TRUMP )  
(o/b/o and Widow of JESSE WILLARD )  
TRUMP) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
EASTERN ASSOCIATED COAL )  
CORPORATION )  
 )  
and ) DATE ISSUED: 05/29/2014  
 )  
PEABODY INVESTMENTS, )  
INCORPORATED )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (2008-BLA-05114, 2008-BLA-05508) of Administrative Law Judge Thomas M. Burke, rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, which involves a miner’s subsequent claim and a survivor’s claim, is before the Board for the second time.<sup>1</sup>

In his initial Decision and Order, the administrative law judge credited the miner with forty years of underground coal mine employment,<sup>2</sup> pursuant to the parties’ stipulation. Regarding the miner’s claim, the administrative law judge found that new evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby demonstrating a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309. Considering the merits of the miner’s claim, the administrative law judge found that the evidence established that the miner was totally disabled due to pneumoconiosis that arose from his coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(c), and awarded benefits. Regarding the survivor’s claim, the administrative law judge found that claimant was automatically entitled to receive survivor’s benefits pursuant to amended Section 932(l) of the Act,<sup>3</sup> based on the award of benefits to her deceased husband. 30 U.S.C. §932(l).

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<sup>1</sup> Claimant is the widow of the miner, who died on October 22, 2006. Survivor’s Claim, Director’s Exhibit 7. The miner’s claim, filed on November 1, 2001, is the miner’s third claim for benefits. Miner’s Claim, Director’s Exhibit 3. His two previous claims, filed in 1974 and 1986, were finally denied because he failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment. Closed Miner’s Claims 1, 2. Claimant filed her survivor’s claim on December 19, 2006, and is pursuing the miner’s claim on behalf of his estate. Survivor’s Claim, Director’s Exhibit 2.

<sup>2</sup> The miner’s last coal mine employment was in West Virginia. Survivor’s Claim, Director’s Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>3</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Congress revived Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor’s benefits without having to establish that the miner’s death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). The

Upon review of the appeal by employer/carrier (employer), the Board vacated the administrative law judge's findings of total disability and a change in the applicable condition of entitlement in the miner's claim, and instructed the administrative law judge to reassess the medical opinion evidence regarding total disability, and explain his findings. *Trump v. E. Assoc. Coal Corp.*, BRB Nos. 12-0011 BLA/A, 12-0012 BLA/A, slip op. at 9-10 (Nov. 7, 2012) (unpub.). Further, the Board vacated the administrative law judge's findings of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), and instructed the administrative law judge to reconsider the relevant evidence.<sup>4</sup> *Id.* at 10-12. Because the Board vacated the award of benefits in the miner's claim, it also vacated the award of benefits in the survivor's claim. *Id.* at 12.

On remand, the administrative law judge found that the new evidence failed to establish that the miner was totally disabled, pursuant to 20 C.F.R. §718.204(b)(2), and denied benefits in the miner's claim. Because he denied benefits in the miner's claim, the administrative law judge found that claimant is not automatically entitled to receive survivor's benefits under amended Section 932(l). The administrative law judge further found that claimant failed to establish that the miner's death was due to pneumoconiosis, pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant argues that the administrative law judge erred in finding that the new evidence in the miner's claim failed to establish total disability, and erred in finding that claimant failed to establish in the survivor's claim that the miner's death was due to pneumoconiosis. Employer has filed a response brief, urging affirmance of the denial of benefits in both claims. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Claimant has filed a reply brief, reiterating her arguments on appeal.

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amendments to the Act do not apply to the miner's claim, which was filed before January 1, 2005.

<sup>4</sup> Addressing claimant's cross-appeal, the Board rejected claimant's challenges to the administrative law judge's evidentiary rulings. Further, the Board held that, contrary to claimant's contention, the administrative law judge did not abuse his discretion in discounting certain blood gas studies because they were administered while the miner was hospitalized for the treatment of acute or cardiac conditions. *Trump v. E. Assoc. Coal Corp.*, BRB Nos. 12-0011 BLA/A, 12-0012 BLA/A, slip op. at 4-5 (Nov. 7, 2012) (unpub.).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

### **Miner's Claim**

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c);<sup>5</sup> *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's prior claim was denied because the evidence did not establish the existence of a totally disabling pulmonary impairment. Therefore, to obtain review of the merits of the miner's claim, claimant had to submit new evidence establishing that the miner was totally disabled. *See* 20 C.F.R. §725.309(c)(3), (4).

On remand, the administrative law judge reiterated his initial findings that neither the pulmonary function study evidence nor the arterial blood gas study evidence supported a finding of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii). In reconsidering the medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that Dr. Houser was the only physician to conclude that the miner was totally disabled.<sup>6</sup> Decision and Order on Remand at 4. Citing seven

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<sup>5</sup> The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

<sup>6</sup> Dr. Rosenberg opined that the miner had no obstruction or restriction, a normal diffusing capacity, and preserved oxygenation, and thus concluded that the miner had no impairment. Employer's Exhibit 9 at 4. Dr. Zaldivar observed that the miner's breathing

blood gas studies that were performed at Appalachian Regional Hospital, Dr. Houser opined that the miner had “persistent findings of moderately severe to severe hypoxemia,” Claimant’s Exhibit 7 at 3, that left him totally disabled. *Id.* at 5. The administrative law judge, however, determined that Dr. Houser’s diagnosis of persistent, moderately severe to severe hypoxemia was supported by only one blood gas study, a qualifying study that was performed in March 2002.<sup>7</sup> Decision and Order on Remand at 5. The administrative law judge found that the remaining blood gas studies did not support Dr. Houser’s opinion, “as Dr. Houser himself found the July 2004 [blood gas study] to show only mild hypoxemia, and the remaining five studies all occurred during hospitalizations for acute non-pulmonary conditions that could have caused hypoxemia.”<sup>8</sup> Decision and Order on Remand at 5; Claimant’s Exhibit 7 at 2. The administrative law judge concluded that Dr. Houser’s opinion, that the miner was totally disabled, “is poorly reasoned, as it relies on a finding of persistent, disabling, pulmonary-based hypoxemia that is not actually supported by the [blood gas studies] of record.” *Id.* at 5-6. The administrative law judge therefore found that the medical opinion evidence did not establish total disability, and found that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

Claimant argues that the administrative law judge erred in discrediting Dr. Houser’s opinion that the miner was totally disabled. Specifically, claimant maintains that Dr. Houser based his opinion on persistent findings of moderately severe to severe hypoxemia, and argues that the administrative law judge mischaracterized Dr. Houser’s

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tests were “almost normal . . . in spite of [the miner’s] very poor effort,” and opined that the miner had “no pulmonary impairment at all.” Employer’s Exhibit 10 at 4.

<sup>7</sup> A qualifying blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

<sup>8</sup> Claimant argues that the administrative law judge erred in discounting the blood gas studies conducted during hospitalizations at Appalachian Regional Hospital. Claimant’s Brief at 11-23. As noted earlier, the Board previously rejected that argument, and affirmed the administrative law judge’s determination that four qualifying arterial blood gas studies obtained in 2006 did not support a finding that the miner was totally disabled, because they were conducted while he was being treated at Appalachian Regional Hospital for acute or cardiac conditions. *Trump*, slip op. at 4-5. That holding constitutes the law of the case, and claimant has not shown that an exception to the law of the case doctrine applies here. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

opinion as depending on his conclusion that the blood gas studies established that the miner was totally disabled. Claimant's Brief at 23-27. Therefore, claimant contends, the administrative law judge erroneously conflated the issue of whether the blood gas study evidence established total disability with the issue of whether Dr. Houser provided a reasoned medical opinion diagnosing total disability. *Id.*

We disagree. As the administrative law judge noted, Dr. Houser opined that the March 2002 blood gas study met the Department of Labor guidelines for establishing "disabling" hypoxemia, and that the July 2004 blood gas study showed "mild" hypoxemia.<sup>9</sup> Claimant's Exhibit 7 at 2. The administrative law judge also observed that the subsequent blood gas studies relied upon by Dr. Houser were performed while the miner was hospitalized for "acute non-pulmonary conditions that could have caused hypoxemia." Decision and Order on Remand at 5. The administrative law judge acted within his discretion as the fact-finder when he concluded that Dr. Houser's opinion that the miner was totally disabled because of "persistent . . . moderately severe to severe hypoxemia," was not well-supported by the blood gas studies in the record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); Decision and Order on Remand at 5-6. We therefore affirm the administrative law judge's finding that claimant failed to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Accordingly, we affirm the administrative law judge's determination that claimant failed to establish that the applicable condition of entitlement has changed since the denial of the miner's prior claim. 20 C.F.R. §725.309(c). We therefore affirm the denial of benefits in the miner's claim.<sup>10</sup>

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<sup>9</sup> Likewise, Dr. Rosenberg testified that, when the miner's age was considered, the July 2004 blood gas study showed "mild" hypoxemia. Employer's Exhibit 17 at 38-41. Dr. Zaldivar testified that the July 2004 blood gas study was normal, given the miner's age, the altitude, and the barometric pressure. Employer's Exhibit 16 (Oct. 13, 2010 deposition) at 56-57. Review of the record does not reveal that Dr. Houser considered the exertional requirements of the miner's usual coal mine employment and addressed whether the miner could perform those tasks with "mild" hypoxemia. *See* 20 C.F.R. §718.204(b)(1),(2)(iv); Claimant's Exhibit 7 at 5.

<sup>10</sup> Because we affirm the administrative law judge's denial of the miner's claim, we also affirm his determination that claimant is not entitled to receive survivor's benefits under amended Section 932(l). 30 U.S.C. §932(l); Decision and Order on Remand at 6.

## Survivor's Claim

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §§718.202(a), 718.203, 718.205(b);<sup>11</sup> *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis.<sup>12</sup> 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000).

The administrative law judge found that the miner had clinical pneumoconiosis,<sup>13</sup> based upon employer's stipulation, and found that the medical opinion evidence

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<sup>11</sup> The Department of Labor revised the regulation at 20 C.F.R. §718.205, effective October 25, 2013. The language previously found at 20 C.F.R. §718.205(c) is now set forth in 20 C.F.R. §718.205(b). 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R. §718.205(b)).

<sup>12</sup> For claims filed after January 1, 2005, and pending on or after March 23, 2010, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of death due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). Noting that the same medical evidence was submitted in the miner's claim and the survivor's claim, the administrative law judge found that, because claimant did not establish that the miner was totally disabled, she did not invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. Decision and Order on Remand at 6 n.2. Because we have affirmed the administrative law judge's finding that claimant did not establish that the miner was totally disabled, we also affirm the determination that she did not invoke the Section 411(c)(4) presumption.

<sup>13</sup> "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

established that he also suffered from legal pneumoconiosis,<sup>14</sup> in the form of emphysema related to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). However, the administrative law judge found that claimant did not establish that the miner's death was due to pneumoconiosis. Decision and Order on Remand at 7-8. The administrative law judge observed that Drs. Imbing and Houser were the only physicians to opine that the miner's pneumoconiosis contributed to or hastened his death from a myocardial infarction. *Id.* at 8. The administrative law judge discredited Dr. Imbing's opinion, as poorly reasoned, because "Dr. Imbing did not elaborate beyond the bare assertion that he believed the miner's [pneumoconiosis] to have hastened his death." *Id.*; Claimant's Exhibit 8. The administrative law judge also discredited Dr. Houser's opinion, finding that it was not supported by the medical evidence of record because it depended on Dr. Houser's conclusion, based on the blood gas study evidence, that the miner suffered from hypoxemia. Decision and Order on Remand at 8. Therefore, the administrative law judge found that claimant failed to establish that the miner's death was due to pneumoconiosis. *Id.*

Claimant contends that the administrative law judge erred in discounting Dr. Houser's opinion on the issue of whether pneumoconiosis caused or hastened the miner's death, believing that he could discredit it for the same reason he discredited Dr. Houser's opinion that the miner was totally disabled.<sup>15</sup> Claimant's Brief at 27-35. This argument has merit. The administrative law judge permissibly interpreted Dr. Houser's opinion as concluding that the miner's clinical and legal pneumoconiosis resulted in hypoxemia, which combined with the miner's coronary artery disease to precipitate the heart attack that caused the miner's death. Claimant's Exhibit 7 at 3-5; Decision and Order on Remand at 8. In discrediting Dr. Houser's opinion, the administrative law judge noted that the opinion depended upon Dr. Houser's determination that the miner "suffered from hypoxemia," but stated that "[a]s described *supra*, . . . Dr. Houser's finding that the miner suffered from hypoxemia during his lifetime is rejected as poorly supported by the objective medical data." Decision and Order on Remand at 8.

A review of the administrative law judge's decision does not disclose substantial evidence for his analysis of Dr. Houser's opinion. When the administrative law judge found that the evidence did not establish that the miner was totally disabled, he did not state that he rejected Dr. Houser's opinion that the miner suffered from any hypoxemia at

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<sup>14</sup> Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

<sup>15</sup> We affirm, as unchallenged on appeal, the administrative law judge's determination that Dr. Imbing's opinion merited little weight. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

all; he stated that he rejected Dr. Houser's conclusion that the miner's hypoxemia was severe enough to be totally disabling.<sup>16</sup> Decision and Order on Remand at 5-6. Whether the miner suffered from a totally disabling respiratory impairment is a distinct issue from whether pneumoconiosis was a substantially contributing cause of his death. See 20 C.F.R. §§718.204(b), 718.205(a). Thus, claimant need not establish that the miner was totally disabled in order to prove that hypoxemia from pneumoconiosis hastened his death. See *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 210, 22 BLR 2-467, 2-480 (3d Cir. 2002) (holding that "lifetime disability or impairment is not an element of proof in hastening") (internal quotations omitted). Moreover, the administrative law judge did not find that Dr. Houser's opinion, that hypoxemia from pneumoconiosis contributed to the miner's death, depended on a determination that the hypoxemia was moderately severe or severe. Decision and Order on Remand at 8; Claimant's Exhibit 7 at 3-5.

Consequently, we conclude that the administrative law judge did not adequately explain his decision to discredit Dr. Houser's opinion regarding the cause of the miner's death, and thereby failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Therefore, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205, and remand this case for the administrative law judge to reconsider whether Dr. Houser's opinion establishes that pneumoconiosis hastened the miner's death. On remand, the administrative law judge must reconsider all of the relevant evidence pursuant to 20 C.F.R. §718.205, and explain his findings in accordance with the requirements of the APA.

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<sup>16</sup> Later in his decision, when addressing the existence of legal pneumoconiosis, the administrative law judge stated that, in his total disability analysis, he found the opinions of Drs. Rosenberg and Zaldivar, that the miner suffered from no lung function impairment, more credible than Dr. Houser's opinion. Decision and Order at 7. A review of the total disability analysis section of the administrative law judge's decision, however, does not reveal such a finding by the administrative law judge. Decision and Order on Remand at 5-6.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge